3. The Lack of a Circuit Split Makes *Certiorari* Inappropriate.

NPPD concedes that there is no circuit conflict about the applicability of the ESA to ongoing agency actions, including dam management, over which agencies retain substantial discretion. Indeed, courts have consistently held that the ESA applies to ongoing agency actions. *See supra* note 2. Instead, NPPD suggests that *certiorari* is appropriate to address the "novel" question of whether an action under review should itself be factored into the environmental baseline. NPPD Conditional Cross Petition at 13. In general, this Court views the absence of a circuit split as a reason not to grant review. In this case, in particular, the argument is probably "novel" only because it is irrational, which makes it particularly inappropriate for review.

Moreover, contrary to NPPD's argument, NPPD Conditional Cross-Petition at 18-19, NOAA Fisheries Service (also known as the National Marine Fisheries Service), does not include the effects of ongoing dam operations in its determination of the environmental baseline. In fact, NOAA Fisheries and the FWS use the same 1998 joint Endangered Species Consultation Handbook, which explicitly provides, at 4-22, that an environmental baseline "does not include the effects of the action under review in the consultation." (http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm (visited Feb. 15, 2006). Accordingly, the NOAA Biological Opinion cited by NPPD similarly states that the baseline "does not include the effects of the action under review." NOAA Fisheries Biological Opinion for Operation of the Federal Columbia River Power System at 5-1 (quoting ESA Consultation Handbook). Although that biological opinion used a complicated and somewhat different way to define the dam operations under review, it still defined the agency action to include the effects

of ongoing, discretionary dam operations, and therefore did not include those effects in the baseline.[3]

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[3] In that biological opinion, the NOAA Fisheries Service attempted to distinguish what it called discretionary dam operations from non-discretionary dam operations, and subjected to review only the "discretionary" dam operations. The non-discretionary dam operations were therefore included in the baseline because they were not part of the government actions subject to review. Even so, that baseline did not grandfather in all previous dam management but only a hypothetical non-discretionary dam management. See discussion in *National Wildlife Federation v. National Marine Fisheries Service*, 2005 Lexis 16345, *43 (D. Or. 2005). In this case, NPPD has not challenged in this Court that all ongoing dam operations are subject to Section 7 of the ESA. It logically and legally follows that the effects of those actions must be held outside the baseline.

NPPD quotes the NOAA biological opinion to the effect that that the "'environmental baseline will necessarily include the effects of past actions taken to construct and operate the ongoing project'." NPPD Conditional Cert Petition at 18 (quoting NOAA Fisheries BiOp). That is true: the effects on endangered species of past operations are part of the baseline, including, for example, diminished population levels that result in part from past operations. This means that in assessing the additive effect of future operations, FWS and NOAA must consider how they will impact a population level that is already low. But the effects of past operations are not the same as the effects of future operations. In other words, neither the FWS nor NOAA can assume as part of the baseline that harmful effects of past operations will continue because the Corps retains broad discretion over how to operate the dams.

CONCLUSION

For the reasons stated above, this Court should decline to grant *certiorari* on the question presented by NPPD.

Respectfully submitted,

TIMOTHY D. SEARCHINGER
MICHAEL BEAN *
ENVIRONMENTAL DEFENSE
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 387-3500

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* *Counsel of Record*